

1. Whether the claimant sustained personal injury by accident arising out of and in the course of her employment on the date alleged;
2. Whether claimant provided timely notice;

3. Whether *Logsdon*<sup>1</sup> precludes claimant's claim for benefits.

Respondent contends claimant not only failed to give notice of her alleged injury, but that the injury did not and could not have occurred as she alleges. Moreover, respondent argues that claimant suffered a prior injury that had not yet healed. Thus, the complaints she purportedly experienced on or about April 21, 2010 were causally connected to her earlier injury and not her work activities while in respondent's employ.

Claimant argues that the ALJ should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The ALJ's Order succinctly and accurately summarizes the evidence relevant to this claim and rather than unnecessarily restate those facts and circumstances, this Board Member merely adopts the same as her own. Suffice it to say, the ALJ concluded claimant's assertion that she injured her left shoulder on or about April 21, 2010 while moving a resident during her normal working shift was credible. She likewise found that claimant provided timely notice of her injury and while claimant most certainly had a history of an injury to her left shoulder (which apparently occurred on December 17, 2009) the uncontroverted evidence was that claimant's present symptoms in her left shoulder are far more significant and intensified when compared to her earlier injury. Additionally, claimant now has pain in her neck following her April 21, 2010 accident. Thus, the ALJ concluded that claimant's shoulder was exacerbated by the accident that occurred on or about April 21, 2010.<sup>2</sup>

Respondent asks the Board to reverse the ALJ's Order and deny claimant any benefits whatsoever. Respondent maintains that the evidence fails to support claimant's assertion that she sustained a compensable injury on or about April 21, 2010. Yvonne McBride, the Director of Nursing for respondent's facility, testified that claimant came to her on April 21, 2010 and advised that her left shoulder hurt but when asked about the source of the injury, Ms. McBride says claimant attributed her complaints to her an earlier injury while in another's employ.<sup>3</sup> And even though claimant's (now former) co-worker Connie Freeborn corroborated the existence of the April 21, 2010 accident and professed to witness the event, respondent offered documentary evidence that suggests Ms. Freeborn was not scheduled to work on April 21, 2010. In addition, respondent points out that

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<sup>1</sup> *Logsdon v. Boeing Co.*, 35 Kan. App.2d 79, 128 P.3d 430 (2006).

<sup>2</sup> ALJ Order (Feb. 3, 2011) at 3.

<sup>3</sup> McBride Depo. at 22.

claimant initially indicated that her accident was unwitnessed but now maintains Connie Freeborn was in the room at the time. To further muddy the evidentiary waters, Ms. McBride testified that the resident claimant claims she was assisting at the time of her accident died 3 days before April 21, 2010.<sup>4</sup> Thus, respondent contends that the accident could not have happened as claimant says. Given these facts, respondent urges the Board to reverse the ALJ's Order and deny claimant any benefits whatsoever.

Alternatively, respondent contends that claimant's present complaints are the result of an earlier December 2009 injury and any symptoms merely evidence an ongoing condition from which claimant has yet to heal. Thus, under the *Logsdon*<sup>5</sup> rationale, respondent maintains it should not be held responsible for claimant's need for medical treatment.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.<sup>6</sup> A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."<sup>7</sup> The phrase "arising out of" employment requires some causal connection between the injury and the employment.<sup>8</sup> The existence, nature and extent of the disability of an injured workman is a question of fact.<sup>9</sup> A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.<sup>10</sup>

The ALJ weighed the evidence and found claimant's recitation of the events to be the most credible. She concluded not only did claimant sustain an accidental injury arising out of and in the course of her employment on or about April 21, 2010, but that she gave timely notice of that injury. This Board Member finds that where there is conflicting

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<sup>4</sup> Respondent's counsel attempted to enter into evidence this patient's obituary but that tender was rejected by the ALJ. Respondent apparently ignored this ruling and attached a copy of the obituary to its submission letter to the ALJ. The ALJ declined to consider the contents of this document. ALJ Order (Feb. 3, 2011) at 2. Likewise, this Board Member has not considered the document.

<sup>5</sup> *Logsdon v. Boeing Co.*, 35 Kan. App.2d 79, 128 P.3d 430 (2006).

<sup>6</sup> K.S.A. 2009 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

<sup>7</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>8</sup> *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

<sup>9</sup> *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

<sup>10</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representative testify in person. This Board often concludes that some deference may be given to an ALJ's findings and conclusions because she was in the unique position to evaluate the witnesses' credibility by personally observing them testify.

Here, there is certainly evidence that would support respondent's contention that claimant's accident could not have happened as claimant contends. But the ALJ expressly concluded that claimant's testimony as to her injury and her conversation with Ms. McBride were credible and satisfied the claimant's evidentiary burdens. After a thorough review of the evidence presented at this juncture of the claim, this Board Member finds, by the barest of margins, that the ALJ's conclusions should not be disturbed.

As for respondent's reliance on the *Logsdon* holding, like the ALJ, this Board Member finds claimant is nonetheless entitled to medical treatment for her present medical complaints. While it is uncontroverted that claimant sustained an earlier injury while working for another employer to the same shoulder involved in this claim, she describes a single acute injury that resulted in a "pop" followed by symptoms to her left shoulder that are more intense than those suffered following her earlier injury. Moreover, she contends that she now has pain in her neck, a symptom that she denies existed before April 21, 2010. Thus, the symptoms claimant describes are not merely a continuation of her earlier complaints, but include additional and more significant symptoms.

In summary, this Board member finds the ALJ's preliminary hearing Order should be affirmed. Based upon the record as presently developed, claimant has met her burden of proof to establish that she sustained an accidental injury arising out of and in the course of her employment on or about April 21, 2010 and gave notice of her accidental injury.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>11</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated February 3, 2011, is affirmed.

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<sup>11</sup> K.S.A. 44-534a.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April 2011.

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JULIE A.N. SAMPLE  
BOARD MEMBER

c: E. Thomas Pyle, III, Attorney for Claimant  
John F. Carpinelli, Attorney for Respondent and its Insurance Carrier  
Jeffrey E. King, Attorney for Respondent  
Rebecca Sanders, Administrative Law Judge